

UNITED STATES DISTRICT COURT
District of MassachusettsUNITED STATES OF AMERICA
V.**Robert A. Fafard****JUDGMENT IN A CRIMINAL CASE**Case Number: **4: 04 CR 40027 - 001 - FDS**

USM Number:

Alan Black

Defendant's Attorney

 Additional documents attached

ATTACHMENT A

THE DEFENDANT:

pleaded guilty to count(s) 1-4

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Additional Counts - See continuation page

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 USC § 2422(b)	Attempted coercion and enticement	11/10/04	1
18 USC § 2252(a)	Transportation of child pornography	10/19/04	2 & 3
18 USC § 2252(a)(4)(B)	Possession of child pornography	11/10/04	4

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

09/07/06

Date of Imposition of Judgment

/s/ F. Dennis Saylor IV

Signature of Judge

The Honorable F. Dennis Saylor IV
U.S. District Judge

Name and Title of Judge

9/19/06

Date

DEFENDANT: **Robert A. Fafard**CASE NUMBER: **4: 04 CR 40027 - 001 - FDS****IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **108** month(s)

This term consists of terms of 108 months on each count, all to be served concurrently.

The court makes the following recommendations to the Bureau of Prisons:

That the defendant be designated to a facility at which he can receive medical and mental health treatment.
That the defendant be designated to FMC Devens, if he is found to be of the appropriate security level.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____.

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____.

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **Robert A. Fafard**CASE NUMBER: **4: 04 CR 40027 - 001 - FDS****SUPERVISED RELEASE** See continuation pageUpon release from imprisonment, the defendant shall be on supervised release for a term of : **5** year(s)

This term consists of 5 years on each count, all such terms to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed 104 tests per year, as directed by the probation officer.

- The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **Robert A. Fafard**Judgment—Page 4 of 10CASE NUMBER: **4: 04 CR 40027 - 001 - FDS****ADDITIONAL SUPERVISED RELEASE PROBATION TERMS**

1. The defendant is prohibited from possessing a firearm or other dangerous weapon.
2. The defendant is not to consume any alcoholic beverages.
3. The defendant is prohibited from possessing a computer and/or related materials except as deemed necessary for work related purposes.
4. The defendant shall report his address, and any subsequent address changes, to the Probation Office, and the defendant shall register as a sex offender as required in any state where he resides, is employed, carries on a vocation, or is a student.

Continuation of Conditions of Supervised Release Probation

DEFENDANT: **Robert A. Fafard**CASE NUMBER: **4: 04 CR 40027 - 001 - FDS**Judgment — Page 5 of 10**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

<u>TOTALS</u>	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
	\$ 400.00	\$	\$

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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TOTALS \$ 0.00 \$ 0.00

See Continuation Page

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **Robert A. Fafard**CASE NUMBER: **4: 04 CR 40027 - 001 - FDS**Judgment — Page 6 of 10**SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A Lump sum payment of \$ _____ due immediately, balance due
 not later than _____, or
 in accordance C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

 Joint and Several See Continuation Page

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

 The defendant shall pay the cost of prosecution. The defendant shall pay the following court cost(s): The defendant shall forfeit the defendant's interest in the following property to the United States:

TCS III Computer, model BG95-AP53; Dell 2400 Computer, serial number 00043-511-383-356; and Kodak digital camera, model CX4230.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

DEFENDANT: **Robert A. Fafard**

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CASE NUMBER: **4: 04 CR 40027 - 001 - FDS**DISTRICT: **MASSACHUSETTS****STATEMENT OF REASONS****I COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT**A **The court adopts the presentence investigation report without change.**B **The court adopts the presentence investigation report with the following changes.**(Check all that apply and specify court determination, findings, or comments, referencing paragraph numbers in the presentence report, if applicable.)
(Use Section VIII if necessary.)1 **Chapter Two of the U.S.S.G. Manual** determinations by court (including changes to base offense level, or specific offense characteristics):

SEE ATTACHMENT A PARAGRAPHS 1-3

2 **Chapter Three of the U.S.S.G. Manual** determinations by court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility):

SEE ATTACHMENT A PARAGRAPHS 4-5

3 **Chapter Four of the U.S.S.G. Manual** determinations by court (including changes to criminal history category or scores, career offender, or criminal livelihood determinations):4 **Additional Comments or Findings** (including comments or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions):C **The record establishes no need for a presentence investigation report pursuant to Fed.R.Crim.P. 32.****II COURT FINDING ON MANDATORY MINIMUM SENTENCE (Check all that apply.)**A No count of conviction carries a mandatory minimum sentence.B Mandatory minimum sentence imposed.C One or more counts of conviction alleged in the indictment carry a mandatory minimum term of imprisonment, but the sentence imposed is below a mandatory minimum term because the court has determined that the mandatory minimum does not apply based on

- findings of fact in this case
- substantial assistance (18 U.S.C. § 3553(e))
- the statutory safety valve (18 U.S.C. § 3553(f))

III COURT DETERMINATION OF ADVISORY GUIDELINE RANGE (BEFORE DEPARTURES):

Total Offense Level: 32

Criminal History Category: I

Imprisonment Range: 121 to 151 months

Supervised Release Range: 3 to 5 years

Fine Range: \$ 17,500 to \$ 175,000

 Fine waived or below the guideline range because of inability to pay.

DEFENDANT: **Robert A. Fafard**CASE NUMBER: **4: 04 CR 40027 - 001 - FDS**DISTRICT: **MASSACHUSETTS****STATEMENT OF REASONS****IV ADVISORY GUIDELINE SENTENCING DETERMINATION** (Check only one.)

A The sentence is within an advisory guideline range that is not greater than 24 months, and the court finds no reason to depart.

B The sentence is within an advisory guideline range that is greater than 24 months, and the specific sentence is imposed for these reasons.
(Use Section VIII if necessary.)

C The court departs from the advisory guideline range for reasons authorized by the sentencing guidelines manual.
(Also complete Section V.)

D The court imposed a sentence outside the advisory sentencing guideline system. (Also complete Section VI.)

V DEPARTURES AUTHORIZED BY THE ADVISORY SENTENCING GUIDELINES (If applicable.)A **The sentence imposed departs** (Check only one.):

below the advisory guideline range

above the advisory guideline range

B **Departure based on** (Check all that apply.):

1 **Plea Agreement** (Check all that apply and check reason(s) below.):

5K1.1 plea agreement based on the defendant's substantial assistance

5K3.1 plea agreement based on Early Disposition or "Fast-track" Program

binding plea agreement for departure accepted by the court

plea agreement for departure, which the court finds to be reasonable

plea agreement that states that the government will not oppose a defense departure motion.

2 **Motion Not Addressed in a Plea Agreement** (Check all that apply and check reason(s) below.):

5K1.1 government motion based on the defendant's substantial assistance

5K3.1 government motion based on Early Disposition or "Fast-track" program

government motion for departure

defense motion for departure to which the government did not object

defense motion for departure to which the government objected

3 **Other**

Other than a plea agreement or motion by the parties for departure (Check reason(s) below.):

C **Reason(s) for Departure** (Check all that apply other than 5K1.1 or 5K3.1.):

<input type="checkbox"/> 4A1.3	Criminal History Inadequacy	<input type="checkbox"/> 5K2.1	Death	<input type="checkbox"/> 5K2.11	Lesser Harm
<input type="checkbox"/> 5H1.1	Age	<input type="checkbox"/> 5K2.2	Physical Injury	<input type="checkbox"/> 5K2.12	Coercion and Duress
<input type="checkbox"/> 5H1.2	Education and Vocational Skills	<input type="checkbox"/> 5K2.3	Extreme Psychological Injury	<input type="checkbox"/> 5K2.13	Diminished Capacity
<input type="checkbox"/> 5H1.3	Mental and Emotional Condition	<input type="checkbox"/> 5K2.4	Abduction or Unlawful Restraint	<input type="checkbox"/> 5K2.14	Public Welfare
<input type="checkbox"/> 5H1.4	Physical Condition	<input type="checkbox"/> 5K2.5	Property Damage or Loss	<input type="checkbox"/> 5K2.16	Voluntary Disclosure of Offense
<input type="checkbox"/> 5H1.5	Employment Record	<input type="checkbox"/> 5K2.6	Weapon or Dangerous Weapon	<input type="checkbox"/> 5K2.17	High-Capacity, Semiautomatic Weapon
<input type="checkbox"/> 5H1.6	Family Ties and Responsibilities	<input type="checkbox"/> 5K2.7	Disruption of Government Function	<input type="checkbox"/> 5K2.18	Violent Street Gang
<input type="checkbox"/> 5H1.11	Military Record, Charitable Service, Good Works	<input type="checkbox"/> 5K2.8	Extreme Conduct	<input type="checkbox"/> 5K2.20	Aberrant Behavior
<input type="checkbox"/> 5K2.0	Aggravating or Mitigating Circumstances	<input type="checkbox"/> 5K2.9	Criminal Purpose	<input type="checkbox"/> 5K2.21	Dismissed and Uncharged Conduct
		<input type="checkbox"/> 5K2.10	Victim's Conduct	<input type="checkbox"/> 5K2.22	Age or Health of Sex Offenders
				<input type="checkbox"/> 5K2.23	Discharged Terms of Imprisonment
				<input type="checkbox"/>	Other guideline basis (e.g., 2B1.1 commentary)

D **Explain the facts justifying the departure.** (Use Section VIII if necessary.)

DEFENDANT: **Robert A. Fafard**

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CASE NUMBER: **4: 04 CR 40027 - 001 - FDS**DISTRICT: **MASSACHUSETTS****STATEMENT OF REASONS****VI COURT DETERMINATION FOR SENTENCE OUTSIDE THE ADVISORY GUIDELINE SYSTEM**

(Check all that apply.)

A The sentence imposed is (Check only one.):

below the advisory guideline range
 above the advisory guideline range

B Sentence imposed pursuant to (Check all that apply.):

1 **Plea Agreement** (Check all that apply and check reason(s) below.):
 binding plea agreement for a sentence outside the advisory guideline system accepted by the court
 plea agreement for a sentence outside the advisory guideline system, which the court finds to be reasonable
 plea agreement that states that the government will not oppose a defense motion to the court to sentence outside the advisory guideline system

2 **Motion Not Addressed in a Plea Agreement** (Check all that apply and check reason(s) below.):

government motion for a sentence outside of the advisory guideline system
 defense motion for a sentence outside of the advisory guideline system to which the government did not object
 defense motion for a sentence outside of the advisory guideline system to which the government objected

3 **Other**

Other than a plea agreement or motion by the parties for a sentence outside of the advisory guideline system (Check reason(s) below.):

C Reason(s) for Sentence Outside the Advisory Guideline System (Check all that apply.)

the nature and circumstances of the offense and the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)
 to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(2)(A))
 to afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B))
 to protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C))
 to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner (18 U.S.C. § 3553(a)(2)(D))
 to avoid unwarranted sentencing disparities among defendants (18 U.S.C. § 3553(a)(6))
 to provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7))

D Explain the facts justifying a sentence outside the advisory guideline system. (Use Section VIII if necessary.)

The last criminal acts under Counts 1-3 (attempted coercion and enticement and transportation of child pornography) had concluded by October 19, 2004. On November 1, 2004, the guideline amendments under the PROTECT Act took effect, substantially increasing the guideline penalties for the offenses at issue. On November 10, 2004, defendant was arrested. However, Count 4 (possession of child pornography) was a continuing offense, and therefore remained ongoing after November 1. There is no evidence that the government deliberately manipulated the arrest date; nonetheless, the timing of the arrest was entirely within the government's control.

Ordinarily, the Court is required to use the guidelines manual in effect on the date of sentencing. See § 1B1.11(a). However, if an ex post facto issue is presented, the Court should use the manual in effect at the time of the offense. See § 1B1.11(b)(1). There is at least a potential ex post facto issue as to Counts 1-3, as the guidelines punishment was increased for those offenses after they were committed. Because, however, the guidelines are not mandatory, there does not appear to be such an issue in the ordinary sense. Nonetheless, because the Court uses the guidelines calculation as a "starting point" for determining the sentence, it appears to be appropriate to start with the 2003 guidelines calculation to avoid any potential unfairness to defendant.

CONTINUED IN SECTION VIII

DEFENDANT: **Robert A. Fafard**

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CASE NUMBER: **4: 04 CR 40027 - 001 - FDS**DISTRICT: **MASSACHUSETTS****STATEMENT OF REASONS****VII COURT DETERMINATIONS OF RESTITUTION**A Restitution Not Applicable.

B Total Amount of Restitution: _____

C Restitution not ordered (Check only one.):

1 For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).

2 For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).

3 For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).

4 Restitution is not ordered for other reasons. (Explain.)

D Partial restitution is ordered for these reasons (18 U.S.C. § 3553(c)):**VIII ADDITIONAL FACTS JUSTIFYING THE SENTENCE IN THIS CASE (If applicable.)**

Upon consideration of the various sentencing factors set forth in 18 U.S.C. § 3553(a), the Court elected to impose a non-guideline sentence at approximately the midpoint between the high end of the 2003 guideline range (97 months) and the low end of the current guideline range (121 months), and therefore imposed a sentence of 108 months. The sentence is intended to exceed the 2003 guideline range in order to reflect the seriousness of the offense and to protect the public.

Sections I, II, III, IV, and VII of the Statement of Reasons form must be completed in all felony cases.

Defendant's Soc. Sec. No.: 000-00-5887Date of Imposition of Judgment
09/07/06Defendant's Date of Birth: 1944/s/ F. Dennis Saylor IVDefendant's Residence Address: 8 White Birch Drive
Worcester, MA 01602Signature of Judge
The Honorable F. Dennis Saylor IV U.S. District JudgeDefendant's Mailing Address: Same as aboveName and Title of Judge
9/19/06

DEFENDANT: ROBERT FAFARD –
CASE NUMBER: 4:04CR40027-01-FDS
DISTRICT: MASSACHUSETTS

ATTACHMENT A

1. The base offense level as to Count I was calculated under § 2G1.3, without applying the cross-reference set forth in § 2G1.3(c)(1), which provides that § 2G21.1 should apply in certain circumstances. The Court agreed with the government that there was insufficient evidence to establish a “substantial step” toward commission of an offense involving the creation of a visual image. This results in a base offense level of 24. A two-level adjustment was added under § 2G1.3(b)(3) for use of a computer, resulting in an adjusted offense level for Count I of 26. (Paragraphs 36-42).

2. A six-level adjustment as to Counts 2 and 3 was calculated under § 2G2.2(b)(3)(D), rather than a seven-level adjustment under § (b)(3)(E). The Court concluded that § (b)(3)(E) is ambiguous as applied to the facts of this case, and accordingly under the rule of lenity applied the adjustment in § (b)(3)(D). The adjusted offense level for Count 2-3 is therefore 32 rather than 33. The Court also added three levels for other relevant conduct, consisting of possession of 150-300 images of child pornography (§ 2G2.2(b)(7)), for a final adjusted offense level of 35. (Paragraphs 43-52).

3. The Court added a six-level adjustment for other relevant conduct, consisting of enticement of a minor to engage in illegal activity (§ 2G2.2(b)(3)(D)), for a final adjusted offense level of 35. (Paragraphs 52A-52I).

4. All four counts were grouped together, making the adjusted offense level 35. (Paragraphs 53-54).

5. The three-level adjustment for acceptance of responsibility under § 3E1.1(2) was applied, for a final offense level of 32. (Paragraph 55).